## Dismissal for Post-Indictment Delay Or The State Never Met a Case It Didn't Like

**by**
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With the Maricopa County Attorney's Office struggling to indict and prosecute ever-growing numbers of defendants (arrested by ever-growing numbers of law enforcement officers, thanks to federal funding), the defense bar more frequently is encountering unconscionable delays between charging and actual prosecution of clients.

The typical case begins with a grand jury indictment, of which the client knows nothing, and issuance of a summons, which never is served. The blissfully ignorant client goes about his business, optimistic that no charges resulted from his original encounter with police. A bench warrant eventually issues for his failure to attend his arraignment, of which he had no notice. The typical client does not follow up on the results of his original arrest, lest he remind the state they have a bone to pick with him – not such a dumb idea when you think of it.

You enter the picture when the client is picked up, let's say 4, 5, or 6 years later. You read the DR and yell into the brittle and yellowing pages, "They can't do that!"

But they have. And to make matters worse, your prosecutor has less than zero interest in prosecuting a stale, six-year-old arrest for one measly rock of crack cocaine. She shoves the file into a bottom drawer after her supervisor refuses to allow her to dismiss it. Not only has no one *ever* worked on this case – not the prosecutor, not the detectives – no one is *about* to work on it.

Except you. You can file a motion to dismiss for post-indictment delay, which in the scheme of things is ever so much more egregious than *pre*-indictment delay.

The United States Supreme Court has delineated four areas of inquiry that your trial judge should weigh when considering your motion to dismiss the indictment: (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as the delay's result.[1] Of the four factors, the length of the delay is the least important, and the prejudice the defendant suffers is the most important factor.[2]

In *Doggett v. United States*,[3] the defendant was indicted in 1980 on drug charges but went to Panama before the DEA could arrest him. They later learned that he was imprisoned in Panama, and requested that he be returned to the United States. However, the DEA did not follow up on its own request and later learned that Doggett had left Panama for Columbia. The DEA made no further attempt to locate him. In 1982 Doggett returned to the U.S., acquired a college degree, steady employment, and a wife, and lived openly under his true name. A simple credit check again put the government on Doggett's trail, and he was arrested in 1988 – 8.5 years after his indictment.

In reversing Doggett's conviction, the Supreme Court discussed the first area of inquiry, whether 8.5 years between indictment and arrest was "uncommonly long." Not surprisingly, they decided it was. The Court relied upon *Barker v. Wingo*[4] for guidance and held that a criminal defendant cannot claim a violation of his speedy trial rights if the state has "prosecuted his case with *customary promptness*"[5] (emphasis added). The Court also offered the common sense proposition that, all things being equal, the required showing of prejudice will intensify as the pretrial delay grows longer.[6]

There is no "magic number" of years when it comes to post-indictment delay. However, certain delays are considered "presumptively prejudicial" as the delay approaches one year.[7] Mr. Doggett's delay stretched 8.5 years; in Arizona, five years' delay has been established as violating the defendant's speedy trial right, sufficient to warrant dismissal of the indictment. In *Humble v. Superior Court*[8] the pivotal issue was whether the state had used due diligence to serve Mr. Humble with notice of his charges. Upon his arrest for DUI, defendant provided the officers with a correct name, current address, social security number, and the name and local phone number of his father. He attended his preliminary hearing, was told his case had been "scratched," and was given no further information. A summons was prepared when the indictment was filed. An unsuccessful attempt was made to personally serve defendant at home. The summons also was mailed but was returned as "unclaimed." After these efforts, a warrant was partly drafted, but was neither completed nor served.

In determining whether Mr. Humble's speedy trial rights had been violated by the passage of five years between the indictment and arrest, the court of appeals considered whether the state had exercised due diligence in service of the summons and warrant. The court held that "'due diligence' requires a showing that the state has followed the 'usual investigative procedures for determining the whereabouts of a person.'"[9] The court held that a mere two attempts to serve the summons even by accepted methods was not "due diligence" when the state had other "significant leads" to locate Mr. Humble. The court also rejected the excuse that alternative methods were not used because of a shortage of manpower and resources.

In *Doggett's* conviction, the Supreme Court reached the same conclusion concerning the efforts of the federal government, which knew Doggett was living abroad. The Court even made the sweeping statement that, "if the Government had pursued Doggett with *reasonable diligence* from his indictment to his arrest, his speedy trial claim would fail."[10]

Thus, both the *Doggett* and *Humble* courts held that the state was to blame for the delays, not the defendants, neither of whom fled prosecution but who lived openly under their true names, right under the government's nose, as it were, while the authorities failed to follow up on known leads.[11]

The final consideration in determining whether post-indictment delay mandates dismissal of the indictment is the prejudice suffered by the defendant. The *Doggett* court rejected the notion that a specific or actual prejudice must be shown (e.g., the death of an important witness). The Supreme Court found that "presumptive prejudice" is *inherent* in undue delay, because it is usually impossible to guess in hindsight what advantages the defendant might have employed at a timely trial: "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify."[12]

In addition to "presumptive prejudice," you should make your trial judge aware of actual or specific prejudice to your client that justifies dismissal of the indictment. One frequently occurring prejudice after a delay of several years is the destruction of evidence.[13] That the destroyed evidence "might" have been exculpatory suffices for dismissal, for negligent destruction of critical evidence denies the accused due process whether or not it can be determined that exculpatory evidence would have developed from the destroyed evidence.[14]

It is well-settled that "[w]hen the state destroys evidence that a defendant has specifically requested be kept, a sanction must be imposed."[15] However, the defendant need not make a specific request when the evidence is of a crucial nature.[16] Arizona courts also are in agreement that the appropriate sanction for destruction of crucial evidence is dismissal.[17]

So – your motion either has succeeded in convincing the state to move for dismissal or the judge has seen it your way and has dismissed the indictment. How do you achieve that sublime state known as "with prejudice"? Rule 16.6(d)[18] states that dismissal of the indictment, information, or complaint "shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice." The test for "prejudice" is the same imprecise general test as set forth in the four *Doggett* factors, and thus prejudice will increase the longer the delay has been. In determining whether interests of justice require dismissal of the prosecution, consideration should be given to normally pertinent factors, such as whether defendant's right to a speedy trial was violated, and again, what prejudice he has sustained by the delay.[19] Other types of prejudice might be whether the state used the delay to gain a tactical advantage over the defendant, or some other improper purpose, as opposed merely to being negligent or understaffed.[20] And do not ignore as prejudicial the anxiety and inconvenience suffered by your client. Did he perhaps get fired for missing too much work while he attended court or for having a felony case pending? Did he depend on public transportation to get to the courthouse for the 25 appearances at which the state continued and continued the matter rather than work on the case?[21] Presenting all the prejudice sustained by your client will give the trial judge ammunition she needs to justify putting a silver stake in an already dead case.

**CONCLUSION.**

Delays that stretch into years between indictment and prosecution are unconscionable and have been held in Arizona and elsewhere to warrant dismissal of the indictment. The message being sent by the courts is clear: if the government can't or won't diligently prosecute a case, they must be persuaded or forced to let the case go, and work on the ones they are willing and able to put some effort into. Dead cases clutter an already strained system, and the defendant's life

should not be put on hold simply because the government never met a case it didn't like.

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[1] *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 2689, 120 L.Ed2d 520 (1992), quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1992). *See also, State v. Kangas*, 146 Ariz. 155, 704 P.2d 285 (App. 1985); *State v. Granados*, 172 Ariz. 405, 837 P.2d 1140 (App. 1991); and *State v. Gilbert*, 172 Ariz. 402, 837 P.2d 1137 (App. 1991).

[2] *State v. Kangas*, 146 Ariz. 155, 704 P.2d 285 (App. 1985); *State v. Granados*, 172 Ariz. 405, 837 P.2d 1140 (App. 1991); and *State v. Gilbert*, 172 Ariz. 402, 837 P.2d 1137 (App. 1991).

[3] 505 U.S. 647, 112 S. Ct. 2686, 2689, 120 L.Ed2d 520 (1992).

[4] 407 U.S. 514 (1992).

[5] Id. at 533-34.

[6] Id. at 536.

[7] *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 2689, 120 L.Ed2d 520 (1992), quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1992).

[8] 179 Ariz. 409, 880 P.2d 629 (1993).

[9] 179 Ariz. at 414, 880 P.2d at 634, quoting *Duron v. Fleishman*, 156 Ariz. 189, 192, 751 P.2d 39, 42 (App. 1988).

[10] 505 U.S. at 656, 112 S.Ct. At 2693 (emphasis added).

[11] The *Humble* court pointed out that the state had the name of defendant's employer, who was listed in the phone book; the name and phone number of the defendant's father; a residential address; and no effort was made to trace his social security number. In the present matter, the state had even more information at its disposal.

[12] 505 U.S. at 656.

[13] For example, in *State v. Richard Smith*, CR 94-02985, the evidence facility destroyed the drug evidence after the co-defendant – also named Smith – entered his guilty plea. Thus, not only was Richard Smith deprived of the opportunity to test the substances' chemistry, but could not objectively prove that the weights were below the threshold – the difference between prison and probation. Ultimately it was not the judge who dismissed this case, but the prosecutor, in response to defense motions.

[14] *State v. Hannah*, 120 Ariz. 1, 583 P.2d 888 (App. 1988)(police inadvertently destroyed evidence which was not requested by defense counsel till shortly before the trial date).

[15] *State v. Lopez*, 156 Ariz. 573, 754 P.2d 300, 302 (App. 1988)(state destroyed tape recordings requested by defendant only three days after his arrest).

[16] *Id.* At 303.

[17] *Id.; see also State v. Escalante*, 153 Ariz. 55, 734 P.2d 597 (App. 1986)(state failed to preserve semen samples in a rape case in which the victim was unsure about identification).

[18] Ariz. R. Crim. Pro.

[19] *State v. Kangas*, 146 Ariz. 155, 704 P.2d 285 (App. 1985); *see also State v. Garcia*, 170 Ariz. 245, 823 P.2d 693 (App. 1991); *State v. Gilbert*, 172 Ariz. 402, 837 P.2d 1137 (App. 1991); and *State v. Granados*, 172 Ariz. 405, 837 P.2d 1140 (App. 1991).

[20] 170 Ariz. at 249.

[21] In *State v. Richard Smith*, *supra* note 13, the client had been arrested and re-arrested so many times while the state kept dropping the ball, that he confided he was frightened to attend his court appearances because he never knew but that he would be picked up again for reasons he didn't quite understand.